IN THE

United States Supreme Court

OCTOBER TERM 1974

No. 74-

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July, 1974

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INTERSTATE COMMERCE COMMISSION, *et al.*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Long Island Rail Road Company ("LIRR"), prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit entered November 7, 1973, reversing the judgment of the United States District Court for the Eastern District of New York, and from its order dated March 29, 1974, upon petitions for clarification, and its decision and judgment upon petition for rehearing entered May 1, 1974.[1]

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[1] The other respondents are United States of America, Ajayem Lumber Corp., Penn Central Transportation Co., Erie Lackawanna Railway Co., Lehigh Valley Railroad Co., John E. Farrell, Trustee of the Central Railroad Co. of New Jersey, and The Baltimore & Ohio Railroad Co.

Opinions Below

The opinions of the Court of Appeals are reported as *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.* at 487 F.2d 179, 496 F.2d 21, and —— F.2d —— and with the judgments are set out in Appendix A at pages 17 to 36 The decision of the District Court is reported at 350 F.Supp. 111.

Jurisdiction

The judgment of the Court of Appeals granting the petition for rehearing, but adhering to the prior decision, was entered May 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals err and frustrate the statutory purpose by holding that railroads acting in concert to impose an increase in rate levels of an individual carrier over its objections, thus unlawfully depriving such carrier of its absolute right of independent action guaranteed by Section 5a(6) of the Interstate Commerce Act (49 U.S.C. § 5b), are subject only to a token penalty, thereby encouraging a continuation of the unlawfully imposed rates?

2. Did the Court of Appeals err in denying to a carrier, unlawfully deprived of its right of independent action, the remedy provided by law and relegating it to a formula for damages which, by its very language, defies proof?

Statutes Involved

The statutes involved in this case are Sections 5a, 6, and 15 of the Interstate Commerce Act (49 U.S.C. §§ 5b, 6, and 15), and a regulation promulgated by the Interstate Commerce Commission pursuant to its authority under Section 6 (49 C.F.R. 1300.52(b)). The pertinent portions of such statutes and regulation are set out in Appendix B hereto at pages 37-44.

Statement of the Case

Railroads receive their compensation for performance of transportation service primarily from their "local" rates or their "divisions" of "joint" rates. On traffic which moves solely between points on its own line, the carrier collects its local rates. Where joint rates for transportation of freight over the lines of two or more railroads have not been agreed to by the involved carriers, the shipper pays a "combination" rate consisting of the sum of the local rates, and each carrier receives its published local rate as its division. Where joint rates have been agreed upon by the participating carriers or prescribed by the Interstate Commerce Commission ("Commission") pursuant to its powers under Section 15(1) or 15(3) (49 U.S.C. § 15(1), (3)), the shipper pays the joint rate, and the participating carriers receive agreed or prescribed divisions of such joint rates.

The problem arises when, as in this case, joint rates have been published and made effective without proper authority, that is, without: (a) agreement of all participating carriers or (b) prescriptive action by the Commission, after hearing, under Section 15(1) or 15(3). Section 6(7) of the Interstate Commerce Act (49 U.S.C. § 6(7)) provides that no railroad shall "charge or demand or collect or receive a greater or less or different compensation . . . than the rates, fares, and charges which are specified in the

tariff filed and in effect at the time . . ." Thus, the rates published in the effective tariff are the "legal" rates which the shipper must pay and the carriers must collect.

However, as this Court pointed out in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), the "legal" rates may not be "lawful" rates, and that is the situation in the case at bar.

Under Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b), the railroads are granted immunity from the antitrust laws with regard to rate negotiations conducted pursuant to their rate-making agreements approved by the Commission. However, Section 5a(6) specifically guarantees each railroad party to such an agreement "the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure," thus ensuring that each individual railroad would be able to protect its interest and those of its shippers by maintaining existing rate levels and declining to acquiesce or concur in proposed rate increases or decreases. As the Court of Appeals correctly found, LIRR's joint rates were increased over its objections and without its consent, and the unlawfully published rates deprived LIRR of its statutory right of independent action.

Section 5a does not provide a remedy for denial of a carrier's statutory right of independent action. However, pursuant to its power under Section 6, the Commission has prescribed rules and regulations, and the last sentence of Rule 52(b) of its Tariff Circular No. 20 (49 C.F.R. § 1300.52 (b)) requires that when a carrier has not lawfully concurred in a joint tariff, it may not accept earnings in accordance therewith, but must demand for the service performed its lawful earnings according to its lawful tariffs, that is, its local rates.

As provided for in Section 6(4) (49 U.S.C. § 6(4)), to avoid the necessity for the printing and filing of countless tariffs by individual carriers, LIRR along with other rail-

roads has given numerous powers of attorney and similar authority to various rate bureaus[2] and to other railroads to print, and file tariffs on its behalf. However, unless the provisions of Section 5a(6) are to be violated, the level of the rates contained in existing tariffs cannot, of course, be changed without the agreement of all participating carriers.

This case arose when the various rate bureaus, under instructions from the other railroads with which LIRR had existing joint rates, and with the approval of the Commission, in violation of the law, increased the joint rates to or from points on the LIRR without LIRR's consent and over its objections, effective November 18, 1969. Rule 52 (b) referred to above, as well as the Commission's decision in *St. Louis & O'Fallon Ry. Co.* v. *E. St. L. & S. Ry. Co.*, 81 I.C.C. 538, 541 (1923), provide that where joint rates are changed without proper authority, the non-concurring carrier must collect its local rates as its divisions of the unlawfully published joint rates. Accordingly, early in December, 1969, LIRR notified the other railroads it would start collecting its local rates as divisions of the unlawful joint rates.

After LIRR's announcement, the Penn Central and other railroads having direct connections with LIRR tried to require prepayment on all shipments destined to points on LIRR. When this ploy was blocked, they began refusing to tender revenue waybills to LIRR at the time cars were interchanged. When LIRR refused to accept cars without the usual revenue waybills, a stalemate resulted on December 14, 1969, with no cars being interchanged for destinations on the LIRR.

On December 16, 1969, one of the industries located on LIRR, the Ajayem Lumber Corp., brought an action in

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[2] In the proceedings before the District Court and the Commission, the Traffic Executive Association—Eastern Railroads ("TEA—ER") was used for illustrative purposes, but the unlawfulness was committed by virtually all rate bureaus and other railroads.

the United States District Court for the Eastern District of New York against Penn Central, its allies, and LIRR, seeking injunctive relief. At the same time, Penn Central and its allies filed a complaint against LIRR. After a stipulation to resume the interchange of traffic with a right to LIRR to retroactively adjust the divisions thereon, the District Court twice referred questions to the Commission for declaratory orders, on which the Commission ruled adversely to LIRR in Ex Parte No. 262 (Sub-No. 1), *Petitions for Declaratory Order—Rule 52 of Tariff Cir. No. 20,* 337 I.C.C. 247 and 337 I.C.C. 274. LIRR then brought a complaint as a third-party plaintiff to review the Commission's orders, naming the United States and the Commission as defendants. Despite the confession by the United States of error by the Commission, the District Court generally followed the Commission's rulings in its decision in *Ajayem Lumber Corp.* v. *Penn Central Transp. Co.,* 350 F. Supp. 111.

Before both the District Court and the Commission, the only question litigated was whether the increased rates were published lawfully or unlawfully and, thus, whether LIRR was or was not entitled to its local rates as divisions. Neither the other railroads nor the Commission questioned the lawfulness, reasonableness, or applicability of the cited regulation in the present case, if the increased rates had been published without proper authority. Their sole defense was that the increase in joint rates was lawful because of LIRR's outstanding powers of attorney and similar authorizations granted by LIRR to other carriers and rate bureaus to print and file tariffs on LIRR's behalf, and both the Commission and the District Court ruled against LIRR on this ground.

Upon LIRR's appeal, the Court of Appeals in its opinion of November 7, 1973, stated:

> ". . . the sole issue upon which this appeal rests is whether the Long Island Rail Road successfully

> divorced itself—or flagged out in Interstate Commerce Commission parlance—from the action of the Tariff Executive Association—Eastern Railroads ('TEA-ER') when that body filed a master tariff with the ICC proposing 6% increases in the joint freight rates [footnote omitted] of the Long Island and its other member railroads." (487 F.2d at 180-181)

On the "sole issue" before it, the Court of Appeals ruled in favor of LIRR, correctly holding that a carrier "does not waive its right of independent action under section 5a of the Act by giving a power of attorney," and that the increase in LIRR's joint rates was established without proper authority. (*Id.* at 183)

But then, instead of remanding to the District Court with instructions that LIRR be permitted to make the "retroactive adjustment" in the divisions of the joint rates under the stipulation and agreement by which the *status quo* was maintained *pendente lite* (350 F. Supp. at 116), the Court of Appeals stated that it was not clear "as to the consequences which should follow" upon remand. Despite the clear provisions of the applicable regulation, the Court of Appeals stated that if LIRR were to collect its local rates, it "would receive a windfall without any showing of actual damages" and that LIRR is entitled to recover only such damages as it actually suffered.

However, the Court of Appeals then referred to LIRR's offer to retain as its divisions only so much of the local rates as was necessary to offset its freight deficits during the period the unlawful rates remain in effect[3] and noted this was "one of several possible solutions to the question

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[3] The unlawfully increased joint rates are still in effect. The District Court declined to act on the remand without some clarification but the Court of Appeals by its order of April 19, 1974 denied all petitions for clarification on whether its decision contemplated a roll-back of the rates. ——F.2d——, *infra*, appendix A, page 31.

of the proper remedy." (487 F. 2d at 183) In view of that statement, no petition for a writ of *certiorari* was filed by LIRR at that time.

On remand to the District Court, the parties were unable to agree, and at the suggestion of that Court, a petition and a motion for clarification were filed by LIRR and by the other railroads on March 7, 1974.

In its decision dated March 29, 1974, on the petitions for clarification, 496 F.2d 21, the Court of Appeals ruled:

> "In the absence of some showing to the contrary, it would appear that the Long Island is entitled to any net revenue reduction caused by the increased joint rates to which it objected. In order to recover the Long Island would have to show the reduction in traffic attributable to the new rates and the revenue it would have realized on the lost traffic if the rates had not been increased over its objection. Offset against this amount would be the increased revenue realized by the Long Island as a result of the increased rates and the reduction in expenses occasioned by its handling of a reduced volume of business."

The formula for computing damages was along the lines advocated by the other railroads. LIRR believes it would be impossible for it or any other railroad to compute damages under such a formula. More important, however, the remedy provided by law is for LIRR to collect its local rates as divisions of the unlawful joint rates and not to attempt to prove damages. Again, however, LIRR believed a petition to this Court for a writ of *certiorari* might be considered premature in view of the reference by the Court of Appeals to "the absence of a showing to the contrary," which seemed to be an invitation to make such a showing.

On April 11, 1974, LIRR filed a petition for rehearing which was granted by the Court of Appeals on May 1, 1974,

—— F.2d ——, infra, appendix A, page 33, but by the same order the Court of Appeals decided to adhere to its previous order, without explaining why it thought the Commission regulation was either inapplicable or unlawful.

ARGUMENT

1. Adoption Of "Damages" As A Remedy For Denial Of The Right Of Independent Action Under Section 5a(6) Would Defeat The Statutory Scheme.

If the decision of the Court of Appeals relegating a carrier unlawfully deprived of its right of independent action to an action for damages based upon a formula not susceptible of proof is allowed to stand, then the entire purpose of Congress in enacting Section 5a(6) of the Act will have been frustrated. The right of independent action as guaranteed by Section 5a(6) was in furtherance of a Congressional policy to insure that each railroad would be free to protect its interests and the interests of industries on its line from the rate actions of other carriers or groups of carriers which could have an adverse local effect.

The impracticability of the "damage" formula adopted by the Court of Appeals is highlighted by the adverse local effect suffered by LIRR as a basic but unprovable result of the rate increases unlawfully imposed upon it.

The number of carloads of freight handled by LIRR has declined tremendously since 1968 or 1969. If LIRR were required to try to calculate its "damages" by computing the revenue and costs attributable to each of the many thousands of cars it has lost since 1968 or 1969, by determining what industries would not have moved from and what new industries would have located on Long Island if it had been permitted to maintain the rates existing in 1969, by developing the amount of additional traffic it would have handled and the revenues from and costs of

handling such traffic, etc., it would probably be many years, if ever, before a figure could be arrived at, and then the figure could probably never be supported by probative evidence.

Moreover, even if the approximate amount of damages could in some way eventually be determined, LIRR could not collect from the vast majority of the railroads who took part in the unlawful act. These actions began in the District Court with the filing of (1) a complaint by shippers against LIRR and the railroads with which it has direct connections and (2) a complaint by such railroads against LIRR. LIRR's subsequent third-party-plaintiff complaint, of course, named as defendants only the Commission and the United States (which confessed error on the part of the Commission). Since none of the other railroads in the country sought to intervene following the service of LIRR's third-party complaint, only those railroads originally parties to the action were within the jurisdiction of the Court. Because LIRR by its third-party complaint was seeking *only a review* of the Commission's declaratory orders denying its right provided by Commission regulation to collect its local rates as its divisions of the unlawful joint rates, and was not seeking "damages" under some theory of tort or breach of contract, LIRR did not name as defendants the other involved railroads, which comprise virtually all the railroads of any size in the country. Obviously, they would not be bound by any judgment for damages in favor of LIRR in an action in which they were not named as defendants and did not choose to intervene. See: *Gratiot State Bank* v. *Johnson*, 249 U.S. 246 (1919); *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 115 (1918). Before it could award any damages against such railroads, the District Court must have *in personam* jurisdiction over them. See, e.g., *Employees Corp.* v. *Bryant*, 299 U.S. 374 (1934).

If the standard of "damages" outlined by the Court of Appeals were to be adopted as the remedy for denial of the right of independent action guaranteed by Section 5a(6), that statutory right would be almost meaningless. According to the testimony of record by the Chairman of the TEA—ER, the principal rate bureau involved, by denying LIRR its statutory right of independent action, the Eastern railroads were able to get $100 million annually which they would otherwise not get from the 6-percent increase in Ex Parte No. 262, and Penn Central's traffic witness testified that carrier alone would reap $40 million annually. With the three subsequent unlawful increases[4] totaling another 22 to 24 percent, the unlawfully obtained and ill-gotten gains of the Eastern railroads would approximate $500 million annually. While LIRR has always doubted the accuracy of such figures, they appear in the verified statements referred to. It will obviously take severe penalties to discourage the other railroads from repeating or force them to discontinue unlawful conduct which they believe to be so profitable. The retention by LIRR of its local rates as its divisions of the unlawful joint rates, as provided by law, is not an inappropriate or disproportionate penalty for the violating railroads to pay and, indeed, may not be sufficient to act as a deterrent. To require them to pay only such damages as can be proven by LIRR under an impossible formula can only act as an invitation to future violations of the right of independent action guaranteed each railroad under Section 5a(6), since all penalties are vitiated and the profits are so great.

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[4] In addition to the unlawful increase in Ex Parte No. 262, three additional unlawful increases were made effective in Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 and Ex Parte No. 281, *Increased Freight Rates and Charges 1972*, 341 I.C.C. 288, before the Commission and the railroads finally decided to recognize LIRR's statutory right of independent action.

2. This Case Involves Solely A Violation Of The Interstate Commerce Act And The Remedy Provided For Such Violation.

The case before the Court of Appeals involved an appeal by LIRR from the decision of the United States District Court for the Eastern District of New York in *Ajayem Lumber Corp.* v. *Penn Central Transp. Co.*, 350 F.Supp. 111, which generally adopted the rulings of the Commission in *Declaratory Order—Rule 52 of Tariff Cir. No. 20*, 337 I.C.C. 247, 337 I.C.C. 274, involving Sections 5a, 6, and 15 of the Interstate Commerce Act (49 U.S.C. §§ 5b, 6 and 15) and, more specifically, one of the regulations prescribed by the Commission pursuant to its powers under Section 6.

Where joint rates for the transportation of freight over the lines of two or more railroads have been established, either by voluntary agreement of *all* participating carriers or by prescriptive action of the Commission, after full hearing, under the provisions of Section 15(1) (or Section 15(3) with regard to initial joint rates), the divisions of such joint rates are either negotiated and voluntarily agreed to by all of the participating carriers or prescribed by the Commission under Section 15(6).

As the Court of Appeals pointed out in its November 7, 1973, decision (487 F.2d at 181), once joint rates are established they cannot lawfully be changed except by agreement of all participating railroads or by the Commission, after full hearing, under Section 15(1). In the instant case, the Commission has never prescribed the general level of joint rates to or from points on LIRR, and LIRR has not agreed to an increase in the general level of its joint rates above that prevailing on November 17, 1969.[5]

So far as lawful joint rates in which LIRR has concurred are concerned, prior to November 18, 1969, the divisions of

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[5] Except for certain surcharges not relevant herein.

such joint rates were on an agreed basis. In August of 1969, LIRR filed a complaint seeking Commission prescription of new divisions with respect to most, although not all, of the joint rates on traffic moving to or from points on LIRR. In Docket No. 35153, *The Long Island Rail Road Company* v. *The Ahnapee and Western Railway Company, et al.* (not printed), the Commission prescribed somewhat higher divisions for LIRR, such order having become effective on October 4, 1973. When lawful joint rates are reinstituted to or from points on LIRR, or new joint rates are prescribed by the Commission after full hearing under Section 15(1), the divisions of such lawful joint rates will be in accordance with the Commission order in Docket No. 35153. The Commission order prescribing divisions of lawful joint rates in Docket No. 35153, however, is not involved in this case and has no bearing on it.

This case involves the question of the divisions of unlawfully established joint rates. As the Court of Appeals correctly found, LIRR's joint rates were unlawfully increased on November 18, 1969, because such increases were without LIRR's concurrence and over LIRR's objections, thus denying LIRR its statutory right of independent action guaranteed by Section 5a(6).

While the joint rates to or from points on LIRR, as increased on November 18, 1969, and on three subsequent occasions since then, were the "legal" rates which shippers must pay, they were unlawful, so far as traffic to or from points on LIRR was concerned, because they were published without proper authority. Pursuant to the provisions of Section 6, the Commission had adopted a rule to cover just such a situation, the last sentence of which provides:

> "The carrier over whose line shipments are sent under a joint tariff is bound by the terms of that tariff if it has lawfully concurred therein, and, if it has not lawfully concurred therein, may not accept earnings in

> accordance therewith, but *must demand* for the service performed its lawful earnings according to its lawful tariffs." (Emphasis added) (49 C.F.R. § 1300.52(b))

Rule 52(b) is in accord with the Commission's decision in *St. Louis & O'Fallon Ry. Co.* v. *E. St. L. & S. Ry. Co.*, 81 I.C.C. 538 (1923), in which the Commission held:

> "The defendants are bound to protect the rate published and held out by them to the public. Complainant, not being a party to the rate published, *must now collect* its local rate and the defendants *must pay* to it this rate until the tariff is corrected in accord with the statute." (Emphasis added) (*Id.* at 541)

In its first report and declaratory order in Ex Parte No. 262 (Sub-No. 1), *Declaratory Order—Rule 52 of Tariff Cir. No. 20*, 337 I.C.C. 247, the Commission held:

> "Under Rules 26(g) and 52 the Long Island would be entitled to its local rates if joint rates were published for its account without the authority of effective powers of attorney or concurrences on file with the Commission. But the insurmountable difficulty with the Long Island's position is that it is a party to the increased joint rates in question and that its participation therein is authorized by outstanding powers of attorney and concurrences which are on file with the Commission." (*Id.* at 252-253)

The Court of Appeals correctly found that the outstanding power of attorney did not constitute proper authority for the action taken and that LIRR's joint rates had been increased without proper authority. Pursuant to the provisions of the stipulation entered into before the District Court as well as under Rule 52(b), LIRR is clearly entitled to collect its local rates as its divisions retroactively to the time of the violation. No one has challenged the lawfulness or applicability of the tariff rule and the Com-

mission has taken no steps to revoke it. It was not until oral argument before the Court of Appeals that counsel for the other railroads suggested that LIRR should not be allowed to collect its local rates because it had not shown it has been damaged to that extent.

Clearly, LIRR is entitled to the statutory remedy and it should not be relegated to a remedy based upon a common law concept of damages under a formula which would make determination of such damages impossible.

3. Rule 52(b) Has The Force Of Law And Provides For The Exclusive Remedy In This Case.

Section 5a(6) of the Act guarantees each carrier the right of independent action, and Section 6(4) (49 U.S.C. § 6(4)) requires the concurrence of all participating carriers in joint tariffs. Pursuant to the provisions of Sections 5, 6 and 12 (49 U.S.C. §§ 5, 6, 12), the Commission has issued tariff rules and regulations (49 C.F.R. § 1300.0, *et seq.*) and Rule 52(b) thereof provides that where a carrier has not lawfully concurred in published joint rates, such carrier "must demand for the service performed its lawful earnings according to its lawful tariffs," which in this case means LIRR's local rates.

It has long been established that such regulations have the force of law. *See, e.g., California Comm'n* v. *United States,* 355 U.S. 534, 542-543 (1958); *Columbia System* v. *United States,* 316 U.S. 407, 418-419 (1942); *Ford* v. *United States,* 371 U.S. 245, 255 (1963); *Abbot Laboratories* v. *Gardner,* 387 U.S. 136, 151-152 (1967); *Davis, Administrative Law,* § 503, p. 126.

It is even more firmly established that such a remedy is exclusive. As early as *Pollard* v. *Bailey,* 87 U.S. 520 (1874), this Court stated:

> "The liability and the remedy were created by the same statute. This being so, the remedy provided is

> exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." (*Id.* at 527)

The *Pollard* decision is still the law today. *See*, e.g., *United States* v. *Madison County Bd. of Education*, 326 F.2d 237, 242 (5th Cir., 1964).

Thus, in this case, Rule 52(b) provides the exclusive remedy, and resort to a theory of "damages" by the Court of Appeals was both unnecessary and improper.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Court should issue a Writ of Certiorari to review the judgments, orders and opinions of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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July, 1974

APPENDIX A

487 F2d 179

Opinion, United States Court of Appeals for the Second Circuit.

Nos. 843, 848—September Term 1972

(Argued June 4, 1973 Decided November 7, 1973)

Docket Nos. 72-2123, 72-2189

AJAYEM LUMBER CORP.,

Plaintiff-Appellee,

v.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the CENTRAL RAILROAD CO. OF NEW JERSEY, BALTIMORE & OHIO RAILROAD CO.,

Defendants-Appellees,

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,

Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellant,

and

INTERSTATE COMMERCE COMMISSION,

Third-Party Defendant-Appellee.

Appendix A.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the CENTRAL RAILROAD CO. OF NEW JERSEY, BALTIMORE & OHIO RAILROAD CO.,

Plaintiffs-Appellees,

v.

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Before: HAYS, MANSFIELD and MULLIGAN, Circuit Judges.

Appeal from a decision and order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, holding that the appellant railroad did not take the proper steps to divorce itself from the action taken by the railroad association of which it was a member and that it was therefore bound by joint rates agreed upon by the association, and enjoining the appellant railroad from refusing to accept freight cars tendered to it upon the existing agreed basis of divisions of joint rates until the Interstate Commerce Commission made a final determination with respect to the divisions.

Reversed and remanded.

Walter J. Myskowski, Washington, D.C. (George M. Onken, Robert R. Prince, Richard H. Stokes, New York, New York, on the brief), for *Appellant Long Island Rail Road Company,*

John B. Wyss (Carl D. Lawson, Thomas E. Kauper, Assistant Attorney General, Department of Justice, Washington, D.C., on the brief), *for Appellant United States of America,*

Appendix A.

Raymond M. Zimmet (Fritz R. Kahn, General Counsel, Interstate Commerce Commission, Washington, D.C., on the brief), *for Appellee Interstate Commerce Commission,*

Edward A. Kaier, Philadelphia, Pennsylvania (Jerome H. Shapiro, New York, New York, Richard J. Murphy, Philadelphia, Pennsylvania, Richard B. Wachenfeld, Newark, New Jersey, Frederick G. Hoffman, New York, New York, Andrew C. Armstrong, Baltimore, Maryland, on the brief), *for Appellee Railroads.*

HAYS, Circuit Judge:

This is an appeal from a decision and order of the United States District Court for the Eastern District of New York in a case which has had a four year history of litigation and adjudication in the Interstate Commerce Commission and the courts. Although there are innumerable complexities involved in the issue of rate-making for railroad carriers of freight, the sole issue upon which this appeal rests is whether the Long Island Rail Road successfully divorced itself—or "flagged out" in Interstate Commerce Commission parlance—from the action of the Tariff Executive Association—Eastern Railroads ("TEA—ER") when that body filed a master tariff with the ICC proposing 6% increases in the joint freight rates[1] of the Long Island and its other member railroads. The district court, in upholding the position of the appellee railroads and the ICC, determined that the Long Island had been unsuccessful in its attempt to "flag out" of the proposed rate increase when notified of it by the TEA—ER and thus it enjoined the LIRR from refusing to accept freight cars tendered to

it and from refusing to apply the newly established formula for division of joint rate revenues—a "self-help" action taken by the LIRR in response to the refusal on the part of the TEA—ER and the ICC to recognize its flag out.

I. Factual Background

The Tariff Executive Association—Eastern Railroads is an association of railroads authorized by section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, and approved by the Commission. The Long Island and the appellee railroads are members of the TEA-ER and have an agreement authorizing joint actions by the Association. The TEA-ER provides a focal point for joint consideration of rate changes and it acts as a tariff bureau which files and publishes the necessary documents to make a rate change effective. To this end, the Association, as do other similar bodies throughout the nation, holds power of attorney from its members which enables it to make publications and filings on behalf of its members. Because such concerted action in the area of rate-making clearly falls within the proscriptions of the federal anti-trust laws, Congress in authorizing such associations exempted them from the anti-trust laws, but in so doing it provided that any agreement establishing the procedure for the determination of joint rates must afford "each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure." 49 U.S.C. § 5b(6).

The "flagging out" procedure which is at the center of the controversy at bar is one method by which member railroads can exercise their right of independent action under section 5a of the Act. It enables a member of a rate-making association to divorce itself from a "joint" decision made by such an association (if that decision has

the effect of changing established rates) by giving due notice to all concerned parties. After that notice is given, the association, acting as agent for the railroads, notes when it publishes the new tariff schedule, that the new rate will not be applicable to the railroad which has "flagged out."

The Interstate Commerce Act provides for two methods for changing existing joint rates. Rates may be changed by a single carrier, by several carriers acting independently of their association, or by all carriers through the action of their association after the consent of all of the affected carriers is received. The *new* rates are then subject to review by the ICC under 49 U.S.C. § 15(7) where a determination of the reasonableness of the new rates is made. The second method of changing existing joint rates is through the action of the Commission—either at the request of other carriers or on its own motion—under section 15(1) after a full hearing is accorded where the views of an objecting carrier may be presented. When the membership of a rate-making association decides to propose changes in existing rates, a dissenting member by giving due notice, i.e. "flagging out," may continue to charge the previouly existing rates. Since proposed rates constitute changes in existing rate schedules, the proposal is subject to ICC examination and possible suspension under section 15(7). Thus in the present case where the Long Island wanted to maintain the status quo its request was not subject to any procedure other than one for "flagging out" or, eventually, if requested by the ICC or a carrier, a section 15(1) full hearing to determine whether the existing rates which it wished to maintain were correct, just and reasonable.

To expedite a rate change, the ICC may give railroads special permission to dispense with some of the publication requirements and proceed in what is known as the short-form method. This procedure was followed in the

case at bar. The sequence of events surrounding the challenged action is set forth in detail in the district court's opinion, 350 F. Supp. 111, 114-117 (E.D.N.Y. 1972), and will not be repeated here.

II. The District Court Decision

The district court concluded that the Long Island was not entitled to claim its local rates because it was bound by the action of its agent, the TEA-ER, in publishing the new rates in its behalf. The court held that the railroad's actions in notifying the Association of its desire not to be included in the new rate schedule were not sufficient to enable the Long Island to maintain its existing rates. The court ruled that a member railroad could opt out of an association decision on rate-making only by revoking the power of attorney that the railroad had given the association. It further decided that such a revocation could only occur in strict accordance with the rules as laid down by the Commission, which would include filing a formal statement of its own proposed revised tariffs for submission to the ICC for approval under 49 U.S.C. § 15(7).

The district court rejected the argument of the Long Island, also made by the United States which had confessed error, that the actions of the TEA-ER and the other carriers in forcing the higher joint rates upon the Long Island violated the right of independent action guaranteed to members of associations such as the TEA-ER by section 5a of the Act. The court found that section 5a, the Reed-Bulwinkle Act, did not call for any change in the consequences of the powers of attorney which were in effect at the time of the adoption of section 5a, and that the Long Island could have exercised its right of independent action by revoking the power of attorney it had filed with the Association.

We reverse. The Interstate Commerce Commission erred in finding that the Long Island Railroad failed to take the proper steps to opt out of the increased rates submitted to the Commission by the tariff-publishing agent of the eastern railroads. It is clear that the Long Island took every step possible to "flag out" of the proposed increased rates submitted to the ICC by the Tariff Executive Association. The railroad appellees and the ICC agree that but for their interpretation of the power of attorney issued by the LIRR to the TEA-ER the Long Island could not be held to have acquiesced in the new rate schedule. We think it patent, however, that the powers of attorney between the railroad members of associations such as the TEA-ER and their agent only give the latter the authority to *file* proposed rate changes and not to set them without consultation or concurrence of the member railroads. Indeed, by letter of October 1969, the chairman of the TEA-ER wrote to the Long Island and stated that the proposed rate schedule was about to be submitted for approval and that he assumed that the Long Island would "join with the other railroads." But, he continued, if "this should be contrary to your desires you may direct me to eliminate the name of your company and the petition will be amended accordingly." Such procedure as the Long Island followed in this case have been considered adequate in the past to enabe a member railroad to disassociate itself from association actions.

The ICC persists in arguing that member railroads of the TEA-ER can revoke their powers of attorney only on giving 60 days notice of intention to file a formal withdrawal. Not only does it appear that the *60* day notice provision is applicable only when a principal is revoking the total power of attorney held by its agent preparatory to its retaining another agent, but more importantly, as we have said, the power of attorney did not authorize the TEA-ER to propose or consent to new tariffs or rates;

it merely permitted the filing of tariffs consented to by member railroads. A carrier does not waive its right of independent action under section 5a of the Act by giving a power of attorney. The suggestion of the ICC, that the Long Island's remedy was to file a suit in equity to compel the agent to file the flag out can hardly be called the kind of independent action which the Reed-Bulwinkle Act was designed to protect.

The ICC also contends that the Long Island's effort to flag out of the new rates was defective because it was not made as a formal motion or similar procedure, the exact nature of which the counsel for the ICC never made clear. The statute does not require any specific form for the "flag out" notice to the Commission and the Long Island's efforts to notify all concerned about its intentions were clearly adequate, especially in view of ICC's lack of precision in what it would require for a "formal" flag notice.

If the Long Island's right of independent action was to be given any meaning at all, it was entitled to a hearing *before* the new joint rates went into effect. Until such a hearing was held and a determination made of the lawfulness of the rates as proposed, the Long Island had a right to insist on the maintenance of its existing joint rates. See *ICC* v. *Columbus & Greenville Ry.*, 319 U.S. 551, 555 (1943).

Although we are persuaded that the position taken by the Long Island must prevail we are not so clear as to the consequences which should follow upon our reversal of the district court's decision. The Long Island is entitled to recover from the railroad defendants only such damages as it actually suffered by reason of the defendant's institution of the new higher rates before the hearing and determination of lawfulness to which the Long Island was entitled. If we were to order that the Long Island should collect as damages the difference between

what it had to charge as divisions of the joint rate and what its local rates were when the changes were made, the Long Island would receive a windfall without any showing of actual damages. Moreover, the ICC has reached the merits of the reasonableness of the increases involved in this dispute and has found that the increases were lawful in that they did not exceed reasonable maximum levels. 337 ICC 274, 286 (1970). Finally, since there have been several subsequent increases further ICC rate proceedings in this action would appear to be unjustified.

The Long Island, in asking this court to reverse the decision of the district court contends that the effect of the higher rates has been to lower the volume of traffic on its road, causing it loss of revenue. It suggests that it be permitted to negotiate new divisions of the joint rates sufficient for it to retain as damages no more than an amount necessary to cover the full costs of performing the freight service with no return on investment or profit above such full costs. While expressing no views as to the merits of this proposal, we note that it is one of several possible solutions to the question of the proper remedy.

A remand is necessary so that the district court may determine the amount of damages, if any, which the Long Island is entitled to receive as a result of our decision determining that the Long Island should have been allowed to flag out of the new joint rates submitted by the TEA-ER and authorized by the ICC.

Reversed and remanded.

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[1] Joint rates are employed when shipments are transported over the tracks of more than one railroad. The rate paid is divided between the railroads over whose tracks the shipments pass according to a schedule established by agreement of the affected railroads. The share of each railroad in the joint rates is usually lower than the charge for a comparable local shipment, i.e., the charge for shipments which travel over the tracks of only one railroad.

Appendix A.

Order of Reversal.

UNITED STATE COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of November one thousand nine hundred and seventy-three.

Present: HON. PAUL R. HAYS
HON. WILLIAM R. MANSFIELD
HON. WILLIAM H. MULLIGAN
Circuit Judges

72-2123
72-2189

Ajaymen Lumber Corp.,

Plaintiff-Appellee,

v.

Penn Central Transportation Co., Erie Lackawanna Railroad Co., Lehigh Valley Railway Co., John E. Farrell, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad, and The Long Island Railroad Company,

Defendants,

The Long Island Railroad Company,

Third-Party Plaintiff-Appellant,

Appendix A.

United States of America and Interstate Commerce Commission,

Third-Party Defendants,

United States of America,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. Daniel Fusaro
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

Appendix A.

Opinion on Clarification, —— F2d ——.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 843, 848—September Term 1972.

(Argued June 4, 1973 Decided March 29, 1974.)

Docket Nos. 72-2123, 72-2189

AJAYEM LUMBER CORP.,
Plaintiff-Appellee,

v.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad Co.,
Defendants-Appellees,

THE LONG ISLAND RAIL ROAD COMPANY,
Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,
Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-Appellant,
and
INTERSTATE COMMERCE COMMISSION,
Third-Party Plaintiff-Appellee.

Appendix A.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co., of New Jersey, Baltimore & Ohio Railroad Co.,

Plaintiffs-Appellees,

v.

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

BEFORE:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

Petition for clarification of a decision of this Court rendered on November 7, 1973, reversing an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, and remanding the case for a determination of the damages to which the Long Island Rail Road Company is entitled.

WALTER J. MYSKOWSKI, Washington, D.C. (George M. Onken, Robert R. Prince, Richard H. Stokes, New York, New York, on the brief), *for Appellant Long Island Rail Road Company,*

JOHN B. WYSS (Carl D. Lawson, Thomas E. Kauper, Assistant Attorney General, Department of Justice, Washington, D.C., on the brief), *for Appellant United States of America,*

Appendix A.

RAYMOND M. ZIMMET (Fritz R. Kahn, General Counsel, Interstate Commerce Commission, Washington, D.C., on the brief), *for Appellee Interstate Commerce Commission,*

EDWARD A. KAIER, Philadelphia, Pennsylvania (Jerome H. Shapiro, New York, New York, Richard J. Murphy, Philadelphia, Pennsylvania, Richard B. Wachenfeld, Newark, New Jersey, Frederick G. Hoffman, New York, New York, Andrew C. Armstrong, Baltimore, Maryland, on the brief), *for Appellee Railroads.*

PER CURIAM:

Appellant Long Island Rail Road Company petitions for clarification of our order of November 7, 1973, with respect to the measure of damages which the Long Island is entitled to recover.

In the absence of some showing to the contrary, it would appear that the Long Island is entitled to any net revenue reduction caused by the increased joint rates to which it objected. In order to recover the Long Island would have to show the reduction in traffic attributable to the new rates and the revenue it would have realized on the lost traffic if the rates had not been increased over its objection. Offset against this amount would be the increased revenue realized by the Long Island as a result of the increased rates and the reduction in expenses occasioned by its handling of a reduced volume of business.

Appendix A.

Order Denying Petition for Clarification,
—— F2d ——

72-2123
B 12

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of April, one thousand nine hundred and seventy-four.

Ajayem Lumber Corp.,

Plaintiff-Appellee,

v.

Penn Central Transportation Co., Erie Lackawanna Railroad Co., Lehigh Valley Railway Co., John E. Farrell, as Trustee of the Central Railroad Co., of New Jersey, Baltimore & Ohio Railroad, and the Long Island Railroad Company,

Defendants,

The Long Island Railroad Company,

Third Party Plaintiff-Appellant.

United States of America and Interstate Commerce Commission,

Third Party-Defendants,

Appendix A.

United States of America,

Third Party Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellee Interstate Commerce Commission filed April 5, 1974 for clarification of a decision of this court filed November 7, 1973 be and it hereby is denied.

PAUL R. HAYS

WALTER R. MANSFIELD

WILLIAM H. MULLIGAN

Circuit Judges

Received

Order Granting Petition for a Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 72-2123

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and Seventy-Four.

Present:

HON. PAUL R. HAYS
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
Circuit Judges.

Appendix A.

AJAYEM LUMBER CORP.,

Plaintiff-Appellee,

—against—

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILROAD CO., LEHIGH VALLEY RAILWAY CO., JOHN E. FARREL, as Trustee of the CENTRAL RAILROAD COMPANY of NEW JERSEY, BALTIMORE & OHIO RAILROAD, and THE LONG ISLAND RAILROAD COMPANY,

Defendants,

THE LONG ISLAND RAILROAD COMPANY,

Third-Party Plaintiff-Appellant,

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants,

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is GRANTED.

s/A. DANIEL FUSARO
Clerk

Appendix A.

Opinion on Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 843, 848—September Term, 1972.

(Argued June 4, 1973 Decided May 1, 1974.)

Docket Nos. 72-2123
72-2189

AJAYEM LUMBER CORP.,
Plaintiff-Appellee,

—v—

PENN CENTRAL TRANSPORATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad Co.,
Defendants-Appellees,

THE LONG ISLAND RAIL ROAD COMPANY,
Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,
Third-Party Plaintiff-Appellant,

—v—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellant,

and

INTERSTATE COMMERCE COMMISSION,
Third-Party Defendant-Appellee.

Appendix A.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad Co.,

Plaintiffs-Appellees,

—v—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Before:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

Petition for rehearing on a decision of this Court rendered on March 29, 1974, clarifying as to the measure of damages a decision of this Court rendered on November 7, 1973, reversing an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* and remanding the case for a determination of the damages to which the Long Island Rail Road Company is entitled.

Petition granted and decision affirmed.

WALTER J. MYSKOWSKI, Washington, D.C. (George M. Onken, Robert R. Prince, Richard H. Stokes, New York, New York, on the brief), *for Appellant Long Island Rail Road Company,*

JOHN B. WYSS (Carl D. Lawson, Thomas E. Kauper, Assistant Attorney General, De-

partment of Justice, Washington, D.C., on the brief), *for Appellant United States of America,*

RAYMOND M. ZIMMET (Fritz R. Kahn, General Counsel, Interstate Commerce Commission, Washington, D.C., on the brief), *for Appellee Interstate Commerce Commission,*

EDWARD A. KAIER, Philadelphia, Pennsylvania (Jerome H. Shapiro, New York, New York, Richard J. Murphy, Philadelphia, Pennsylvania, Richard B. Wachenfeld, Newark, New Jersey, Frederick G. Hoffman, New York, New York, Andrew C. Armstrong, Baltimore, Maryland, on the brief), *for Appellee Railroads.*

PER CURIAM:

By an opinion dated November 7, 1973, this court reversed a judgment entered in the United States District Court for the Eastern District of New York and remanded the cause for determination of damages. On a petition for clarification we entered an order dated March 29, 1974, clarifying as to the measure of damages our opinion of November 7, 1973. The Long Island Rail Road Company has now petitioned for a rehearing on our order of March 29, 1974.

We grant the motion for rehearing and on consideration thereof we decide to adhere to our order of March 29, 1974.

APPENDIX B

Section 5a(6) Interstate Commerce Act (49 U.S.C. § 5b(6))

"Agreements for determining matters through joint consideration.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."

Section 5a(9) Interstate Commerce Act (49 U.S.C. § 5b(9))

"Relief from operation of antitrust laws.

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

Section 6(3) Interstate Commerce Act (49 U.S.C. § 6(3))

"Change in rates, fares, etc.; notice required; simplification of schedules.

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and

to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* that the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest."

Section 6(4) Interstate Commerce Act (49 U.S.C. § 6(4))

"Joint Tariffs.

(4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

Appendix B.

Section 6(7) Interstate Commerce Act (49 U.S.C. § 6(7))

"Transportation without filing and publishing rates forbidden; rebates; privileges.

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15(1) Interstate Commerce Act (49 U.S.C. §15(1))

"Commission empowered to determine and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by

any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed."

Section 15(3) Interstate Commerce Act (49 U.S.C. § 15(3))

"Establishment of through routes, joint classifications, joint rates, fares, etc.

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon

its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Section 15(6) Interstate Commerce Act (49 U.S.C. § 15(6))

"Commission to establish just divisions of joint rates, fares, or charges; adjustments.

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or prop-

erty, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

Section 15(7) Interstate Commerce Act (49 U.S.C. § 15(7))

"Commission to determine lawfulness of new rates; suspension; refunds.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts

received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Rule 52(b) Interstate Commerce Commission Tariff Circular No. 20 (49 C.F.R. § 1300.52(b))

"Tariff unlawful as to carriers named without authority. (b) If one or more carriers are, without proper authority, so shown as participating in any tariff and other carriers are lawfully shown as parties thereto, the use of the publication is unlawful as to the carriers that are named as parties thereto without proper authority and lawful as to those that are parties to it under proper authority. The carrier over whose line shipments are sent under a joint tariff is bound by the terms of that tariff if it has lawfully concurred therein, and, if it has not lawfully concurred therein, may not accept earnings in accordance therewith, but must demand for the service performed its lawful earnings according to its lawful tariffs."